

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petition of
Nebraska Public Service Commission and
Kansas Corporation Commission
for Declaratory Ruling or, in the Alternative,
Adoption of Rules Allowing State Universal
Service Funds to Assess Charges on
Nomadic Voice Over Internet Protocol
Intrastate Revenues

WC Docket No. 06-122

COMMENTS OF

CALAVERAS TELEPHONE COMPANY
CAL-ORE TELEPHONE CO.
DUCOR TELEPHONE COMPANY
FORESTHILL TELEPHONE CO.
HAPPY VALLEY TELEPHONE COMPANY
HORNIOS TELEPHONE COMPANY
KERMAN TELEPHONE COMPANY
PINNACLES TELEPHONE CO.
THE PONDEROSA TELEPHONE CO.
SIERRA TELEPHONE COMPANY, INC.
THE SISKIYOU TELEPHONE COMPANY
VOLCANO TELEPHONE COMPANY
WINTERHAVEN TELEPHONE COMPANY

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September 9, 2009

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I

SUMMARY

Pursuant to the Public Notice DA 09-1774, released August 10, 2009, Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Co., Pinnacles Telephone Co., The Ponderosa Telephone Co., Sierra Telephone Company, Inc., The Siskiyou Telephone Company, Volcano Telephone Company, and Winterhaven Telephone Company (hereinafter the "California Small ILECs") hereby submit these comments in support of the joint petition of the Nebraska Public Service Commission ("NPSC") and the Kansas Corporation Commission ("KCC") for a declaratory ruling that the Federal Communications Commission ("FCC") has not preempted states from assessing universal service charges on providers of nomadic Voice over the Internet Protocol ("VoIP") service.

II

BACKGROUND

In California, there is a state universal service fund (the California High Cost Fund-A or "CHCF-A") that is administered by the California Public Utilities Commission (the "CPUC") for the benefit of the subscribers of the California Small ILECs, each of which meets the definition of a rural telephone company as set forth in 47 U.S.C. § 153(37). According to the legislation enacted authorizing the CHCF-A, the purpose of the program is to promote the goals of universal telephone service and to reduce the disparity in the rates charged by small independent telephone companies serving rural areas. (California Public Utilities Code Section 739.3(a).)

The CHCF-A is funded through a billing surcharge on intrastate telecommunications services. Currently, the CPUC does not require VoIP providers to contribute to the state universal service funds such as the CHCF-A. (See Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the Public Utility Telephone Service Known as Voice over Internet Protocol Should be Exempted from Regulatory Requirements, Decision No. 06-06-010, Order Closing Proceeding (Cal.P.U.C. June 15, 2006); in this decision, the CPUC determined that it was premature to establish intrastate regulatory requirements for VoIP providers, including intrastate universal service contribution requirements, given the regulatory uncertainty caused by the pending proceedings before the FCC.)

Although the CPUC does not currently require VoIP providers to contribute to the California universal service funds, it is very important that it and other state commissions have the express ability to do so. The increasing volume of services provided by VoIP providers is having a growing impact on intrastate universal service funding because of the corresponding decreased availability of state universal service fund contributions from non-VoIP sources.

III

THE CALIFORNIA SMALL ILECS SUPPORT THE PETITION OF THE NPSC AND KCC FOR DECLARATORY RULING

The petition by the NPSC and KCC for declaratory ruling seeks an order that states may assess universal service funding obligations on VoIP providers. As they point out, the FCC has already interpreted its rules this way in a brief it filed last year with the United States Court of Appeals for the Eighth Circuit Court of Appeals. In its brief, the FCC stated that there is no conflict between federal assessments of universal service contributions on the interstate portion of a VoIP provider's revenue and a state's assessment of universal service contributions on the intrastate portion; therefore, according to the FCC, states are not preempted from requiring such contributions from nomadic VoIP providers.

The Eighth Circuit agreed that the FCC can decide whether states may require intrastate universal service fund contributions from VoIP providers. In its decision, the Court stated, that “[A] universal service fund surcharge could be assessed” on intrastate

revenues, but “the FCC... and not the state commissions, has the responsibility to decide if such regulations will be applied.” (Vonage Holdings Corp. v. Nebraska Pub. Serv. Commission, 564 F.3d 900, 905(8th Cir. May 1, 2009). The brief filed with the Eighth Circuit by the FCC, however, was not enough for the Court. Instead, the Eighth Circuit requires that the FCC do more. Specifically, the Court found that the FCC needs to issue a formal order to that affect. Accordingly, the FCC should grant the petition of the NPSAC and KCC and issue a declaratory ruling that states may assess universal service contributions on VoIP providers.

The FCC should issue such an order. VoIP providers should be required to contribute to state as well as federal universal service funds due to the fact that they "benefit from universal service because much of the appeal of their services to consumers derives from their ability to place calls to and receive calls from the [public switched telephone network]." (Report and Order and Notice of Proposed Rulemaking, Universal Service Contribution Methodology, 21 FCC Rcd 7518, 7536 ¶ 43 (2006) ("VoIP Contribution Order"), *aff'd. in part and rev'd. in part*, Vonage Holdings Corp. v. FCC, 489 F.3d 1232 (D.C. Cir. 2007).) Such an order would promote rather than impair the principle of competitive neutrality by reducing "the possibility that carriers with universal service obligations will compete directly with providers without such obligations." (VoIP Contribution Order at ¶ 44.)

Unless the FCC issues the declaratory ruling requested in this proceeding, states that assess universal service contributions on VoIP providers will continue to face the prospect of preemption litigation, just as the NPSC did, and VoIP providers will have an

unfair and unwarranted competitive advantage over traditional circuit switched service providers.

As set out in detail in the Petition of the NPSC and KCC, preemption should not occur, and as set out in the FCC's brief to the Eighth Circuit, preemption is not warranted. Indeed, in various decisions to date, the FCC has already determined that for regulatory purposes it should treat VoIP providers the same as traditional circuit switched telecommunications providers. For example, in 2004, the Commission ruled that AT&T's IP Telephone Service is a telecommunications service subject to interstate access charges because the calls originate and terminate on the PSTN and only use IP to transport the call. In 2005, the FCC required interconnected VoIP providers to supply enhanced 911 capabilities to their customers as a standard feature and applied provisions of the Communications Assistance for Law Enforcement Agencies ("CALEA") to providers of interconnected VoIP services. In 2006, the FCC extended federal USF contribution requirements to interconnected VoIP providers. In 2007, the FCC applied TRS contribution obligations to interconnected VoIP providers. The Commission should follow this line of decisions and issue the definitive ruling described by the Eighth Circuit and requested by the NPSC and KCC that state assessments of universal service contributions from VoIP providers are not preempted by federal law.

Vonage itself apparently does not oppose state universal service funding assessments. (See Letter from Brita D. Strandberg, Wiltshire & Grannis, Counsel for Vonage, to Marlene H. Dortch, FCC, WC Docket No. 06-122 (Aug. 7, 2009). See also Letter from Brita D. Strandberg, Wiltshire & Grannis, to Marlene H. Dortch, FCC, WC

Docket No. 06-122 (Aug. 25, 2009).) Vonage, however, asks that the Commission open a rulemaking to consider the NPSC and KCC Petition rather than issue the declaratory ruling. The California Small ILECs do not believe a rulemaking proceeding is necessary or in the public interest. Instead, the FCC should issue the declaratory ruling without the delay of further proceedings. The concerns expressed by Vonage about potential duplicative assessments can be addressed adequately by the terms of the declaratory ruling itself based on the information already available to the Commission. On the other hand, further delay in the ability of states to seek intrastate universal service funding from VoIP carriers would adversely affect the public interest given the rate at which VoIP traffic is growing.


IV

CONCLUSION

For the reasons set forth above and in the Petition for Declaratory Ruling submitted by NPSC and KCC, the FCC should issue at the earliest opportunity an order

that states are not preempted from imposing requirements on nomadic interconnected VoIP providers to contribute to state universal service funds.

Respectfully submitted this 9th day of September, 2009.

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CERTIFICATE OF SERVICE

I, Noel Gielegthem, declare:

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is COOPER, WHITE & COOPER LLP, 201 California Street, 17th Floor, San Francisco, CA 94111.

On September 9, 2009, I served the

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SIERRA TELEPHONE COMPANY, INC.
THE SISKIYOU TELEPHONE COMPANY
VOLCANO TELEPHONE COMPANY
WINTERHAVEN TELEPHONE COMPANY**

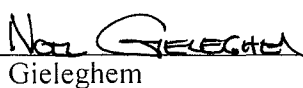
by placing a true and correct copy of these **COMMENTS** with the firm's mailing room personnel, for mailing in accordance with the firm's ordinary practices addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 9, 2009, at San Francisco, California.



Noel Gielegthem